IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

v.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

No. 6416

MOTION OF APPELLEES, TO DISMISS OR AFFIRM
and
BRIEF AND ARGUMENT ON SAME

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

ALICE M. BIRDSALL,
THOMAS W. NEALON,
Attorneys for Appellees.

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

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Appellees.

No. 6416

MOTION OF APPELLEES, TO DISMISS OR AFFIRM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

COME now MOMSEN - DUNNEGAN - RYAN COMPANY, a corporation, PRATT-GILBERT HARDWARE COMPANY, a corporation, and UNION OIL COMPANY OF ARIZONA, a corporation, petitioning creditors, appellees herein, by Alice M. Birdsall, their counsel, and WILLIAM L. HART, as trustee in bankruptcy of the Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, bankrupts, appellee, by Thomas W. Nealon, his counsel, and move this court to dismiss, with costs, the appeal taken herein to this court, by the Standard Sanitary Manufacturing Company, a corporation, upon the following grounds:

I.

That this court is without jurisdiction to hear and determine the appeal herein attempted to be prosecuted by the Standard Sanitary Manufacturing Company, a corporation, appellant herein, for the reason that no appealable question within the purview of the Bankruptcy Act is presented by the proceedings herein, nor is said appeal prosecuted in accordance with the plain provisions of the Bankruptcy Act.

That this is so for the following reasons:

That the jurisdiction of this court to hear and determine this appeal is limited by the provisions of Section 25 of the Bankruptcy Act relating to appeals in "Proceedings in Bankruptcy", and the right of appeal to this court in the instant case, if any right exists, is governed by sub-section (1) thereof, providing for an appeal "From a judgment adjudging or refusing to adjudge the defendant a bankrupt." That as is apparent from the record herein, namely, from the Petition for Appeal

(Transcript pages 627-628) and from Assignments of Error of the appellant (Transcript pages 628-638), the appeal here attempted is expressly limited to two findings of fact and one conclusion of law made by the Master in his report and confirmed by the Judge of the District Court in rendering judgment confirming the Master's report in toto, being seventeen (17) findings of fact and five (5) conclusions of law based thereon, and adjudging the defendants bankrupts, said findings of fact and conclusions of law from which the appeal is sought, relating to an alleged preferential payment to the appellant (a creditor) herein, found by the Master to constitute an Act of Bankruptcy; and no appeal is sought or attempted with respect to the findings of fact of the Master, and the conclusions of law based thereon, finding other acts of Bankruptcy to have been committed, nor to the findings of fact of the Master and the conclusions of law based thereon, finding the Phoenix Plumbing and Heating Company to be a partnership, consisting of Leo Francis, Lyon Francis and D. L. Francis, nor from the judgment of the District Court for the District of Arizona adjudging defendants bankrupts, both as a partnership and individually.

That the appellant has, through counsel, entered into a stipulation with the counsel for the trustee in bankruptcy, appellee, as to the "Scope of the Appeal" herein, which stipulation is on file in this court and is in words and figures as follows:

"It is stipulated by and between the Standard Sanitary Manufacturing Company and the Trustee in Bankruptcy herein that the decision of the District Court in holding that acts of bankruptcy alleged in creditors petition other than the one based on finding of fact No. 16

were committed by the bankrupts, and the finding thereof was sustained by competent evidence free from all legal objections and that the appeal of the Standard Sanitary Manufacturing Company from said finding of fact No. 16 and conclusion of law No. 4 contained in the Master's Report, upon which the adjudication was based, is not intended to raise any question as to the adjudication in bankruptcy of bankrupts herein as of August 17, 1929, contained in the order of the District Court dated June 10, 1930, and of the appointment and jurisdiction of the Trustee over the entire bankrupt estate, save the right of the Trustee to take any action to bring back into the estate the Thirteen Thousand ($13,000.00) Dollars which is the subject matter of said finding of fact No. 16 and conclusion of law No. 4.

ARMSTRONG, KRAMER, MORRISON & ROCHE,
Attorneys for Standard Sanitary Manufacturing Company, Objecting Creditors and Appellant Herein.

THOMAS W. NEALON,
Attorney for William L. Hart, Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, as Copartners and Individuals."

That appellant has, further, in its opening brief, filed herein, reiterated that no appeal is taken, or attempted, from the judgment adjudging the Phoenix Plumbing and

Heating Company, a copartnership, and Leo Francis, Lyon Francis and D. L. Francis, individually, bankrupts. This statement defining the extent of the appeal and the issues sought to be raised in this court which is an admission of counsel made in this court, binding upon the appellant, is found on pages 7 and 8 of Appellant's brief, and is as follows:

> "From this finding of fact and conclusion of law the Standard Sanitary Manufacturing Company excepted to the United States District Court, which exceptions were argued before the said court on the 10th day of June, 1930, and a decision rendered sustaining the Master's report in toto. From this judgment the Standard Sanitary Manufacturing Company, appellant herein, appealed to this court, *confining its appeal to the finding of fact and conclusion of law covering the so-called Lincoln Mortgage Company transaction, and the question of insolvency prior to the 20th day of July, 1929.*
>
> "In making this appeal the Standard Sanitary Manufacturing Company did not file a supersedeas bond, but filed a cost bond in the sum of $1500 and thereafter entered into a stipulation with the attorney for the Trustee in Bankruptcy by the terms of which it was provided that the scope of the appeal of the Standard Sanitary Manufacturing Company was and is confined to the Lincoln Mortgage Company transaction, and the question of insolvency insofar as the same affects said transaction.
>
> *"The Standard Sanitary Manufacturing Company did not at any time in the proceedings raise any question whatsoever as to the adjudication on the 17th day of August, 1929, nor to the findings of*

fact and conclusions of law on other acts of bankruptcy save the Lincoln Mortgage Company transaction." (Italics ours.)

That the jurisdiction of Federal courts with respect to bankruptcy matters is governed by the provisions of the Bankruptcy Act and that appellate procedure in Bankruptcy necessarily follows the plain provisions of said Act.

That appeals as of right in "bankruptcy proceedings" are strictly limited to the three matters clearly set forth in Section 25 of said Act as follows:

(1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

That appeals in bankruptcy in all other matters save the three judgments above specified can be taken only in accordance with the provisions of Section 24 of the Act, and said appeals must be allowed by the Appellate court, a procedure which has not been followed in this case.

That no authority can be found in Section 25 for such an appeal as is here attempted, and that since no appeal has been sought from the judgment herein adjudicating the defendants bankrupts, no appealable question is before this court for review, and the said appeal must be dismissed for lack of jurisdiction in this court.

II.

That appellant herein has not prosecuted an appeal from, nor asked for a review of, the whole of the judgment or decree rendered in said matter, and there is no

actual controversy involving real and substantial rights between the parties to the record and no subject matter upon which the judgment of the court can operate, so that the only matters of which review by this court are sought by appellant herein, are moot for the following reasons:

A judgment overruling objections to the report of the Special Master and confirming said report, and adjudging the Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and D. L. Francis, Leo Francis and Lyon Francis, as individuals, to be bankrupt, was made and entered by F. C. Jacobs, Judge of the District Court for the District of Arizona, on the 10th day of June, 1930. (Transcript pages 34-35.) That appeal has not been taken from said judgment and decree, but only from one finding of fact and one conclusion of law based on said finding of fact of said Special Master, both of which concerned only one alleged act of Bankruptcy, relating to an asserted preferential payment of $13,000 to said appellant, and another finding of fact of said Special Master relating to the time of insolvency as affecting said alleged preferential payment made to said appellant, as will appear by the Assignments of Error of said appellant. (Transcript pages 628 to 638.)

That the only question sought to be reviewed by the appeal taken herein as appears by the record herein, (Transcript pages 627 to 638) and by the language of the stipulation as to the scope of appeal filed herein as follows:

> "It is stipulated by and between the Standard Sanitary Manufacturing Company and the Trustee in Bankruptcy herein that the decision of the Dis-

trict Court in holding that acts of bankruptcy alleged in creditors petition other than the one based on finding of fact No. 16 were committed by the bankrupts, and the finding thereof was sustained by competent evidence free from all legal objections and that the appeal of the Standard Sanitary Manufacturing Company from said finding of fact No. 16 and conclusion of law No. 4 contained in the Master's Report, upon which the adjudication was based, is not intended to raise any question as to the adjudication in bankruptcy of bankrupts herein as of August 17, 1929, contained in the order of the District Court dated June 10, 1930, and of the appointment and jurisdiction of the Trustee over the entire bankrupt estate, save the right of the Trustee to take any action to bring back into the estate the Thirteen Thousand ($13,000.00) Dollars which is the subject matter of said finding of fact No. 16 and conclusion of law No. 4.

ARMSTRONG, KRAMER, MORRISON & ROCHE,
Attorneys for Standard Sanitary Manufacturing Company, Objecting Creditors and Appellant Herein.

THOMAS W. NEALON,
Attorney for William L. Hart, Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, as Copartners and Individuals."

and as further admitted by the language of said appellant in its opening brief filed herein, (appellant's brief pages 7 and 8) is stated in appellant's own language at the conclusion of its brief on page 45 thereof, as follows, to-wit: "that this appellant is entitled to a decision declaring said transaction to be not an act of bankruptcy, not an act made with intent to prefer one creditor over another."

That the appellant herein is seeking a "declaration" only upon this one matter without disturbing the adjudication of bankruptcy based upon other acts of bankruptcy, the findings on which are not set up as error, but on the contrary, are admitted by said stipulation to have been "sustained by competent evidence free from all legal objections."

That there is, therefore, no controversy involving real and substantial rights between the parties before this court, and no subject matter upon which the judgment of this court can operate for the reason that the right of the trustee to take action to bring back into the bankrupt estate said alleged preference of $13,000.00 could not be prejudged by this court, since the proof required for an alleged preference as constituting an act of Bankruptcy and that required for recovery of an alleged preference by the trustee is entirely different and covered by different provisions of the Bankruptcy Act. That the language governing the former is found in Section 3 of the Bankruptcy Act, as follows:

> "a—Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors * * *. b—A petition may be filed against a person who is insolvent and who

has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer * * * for the purpose of giving a preference as hereinbefore provided * * *, if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary take notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment. * * * ."

While the provisions governing the latter are found in Section 60 of said Bankruptcy Act as follows:

"b—If a bankrupt shall have * * * made a transfer of any of his property, and if at the time of the transfer * * * or of the recording or registering of the transfer, if by law recording or registering thereof is required and being within four months before the filing of the petition in bankruptcy, or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

That the petitioning creditors in the hearing upon the matter of adjudication were only required to make proof of said alleged Act of Bankruptcy in accordance

with the provisions of Section 3 of the Bankruptcy Act, and that even though this court, upon an examination of the record herein should find that the evidence adduced by the petitioning creditors at the hearing on adjudication was insufficient to warrant the Finding of Fact Number 16 and the Conclusion of Law Number 4 based thereon, with regard to said $13,000.00 payment made to the appellant constituting an act of Bankruptcy, since other acts of Bankruptcy were found by the court below and are unquestioned by this appeal, which would require an affirmance of the Order and Decree of Adjudication, no present controversy is presented by this appeal and the decision asked by appellant would necessarily be upon a moot question.

That the trustee in bankruptcy may never bring a suit against the appellant herein to recover the alleged preference, or may bring action against said appellant based on other evidence now or hereafter available to him, or may bring suit for recovery of said amount as a fraudulent transfer, but until some action is brought by said trustee for recovery of said amount, there is no present controversy, the subject matter of which presents a reviewable question to this court to be passed upon with respect to the $13,000.00 payment made to appellant herein, and the relief asked by appellant is clearly upon a moot question.

III.

That the appellant herein is estopped from asking review of a part of said judgment or decree entered by the District Court of the United States for the District of Arizona on the 10th day of June, 1930, namely, that part of said judgment which concerns an alleged preferential payment received by the appellant herein, and which rul-

ing concededly in no wise affects the adjudication in bankruptcy based upon other Acts of Bankruptcy, while taking advantage of the decree as a whole and accepting the benefits of the adjudication of bankruptcy.

That the appellant herein, both prior and subsequent to the taking of this appeal, has participated in the administration of the bankrupt estate, and its conduct in that respect is entirely inconsistent with the claim of right to review a part of said judgment or decree.

That said appellant on June 24, 1930, filed its unsecured claim in said Bankruptcy Court in the amount of $12,658.59, and participated in the election of a trustee in bankruptcy by voting its claim for the present trustee, and that thereafter and on the 8th day of November, 1930, at a meeting of creditors called for the purpose of authorizing the trustee to oppose the discharge of D. L. Francis, one of the bankrupts, it voted its claim in favor of so authorizing said trustee to oppose said bankrupt's discharge, and that on April 2nd, 1931, it filed, in conjunction with the McGinty Construction Company, a petition to the Bankruptcy Court asking an order authorizing the trustee in Bankruptcy to disclaim on a defaulted contract; all of which appears by certified copies of said proceedings of said Bankruptcy Court hereto attached, marked Exhibit "A" and by reference made a part hereof.

WHEREFORE, Appellees, Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, and William L. Hart, as trustee in bankruptcy of the Phoenix Plumbing and Heating Company, a copartnership composed of Leo Francis, D. L. Francis, and Lyon Francis, copartners, and Leo Francis, D. L.

Francis and Lyon Francis, as individuals, bankrupts, ask this Honorable Court to dismiss the appeal filed by the Standard Sanitary Manufacturing Company, appellant herein, at its costs.

ALICE M. BIRDSALL,
Counsel for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors, Appellees.

THOMAS W. NEALON,
Counsel for William L. Hart as Trustee in Bankruptcy of the Estate of the Phoenix Plumbing and Heating Company, Bankrupt, a Copartnership, Consisting of Leo Francis, D. L. Francis and Lyon Francis, Copartners, and D. L. Francis, Leo Francis and Lyon Francis, as Individuals, Bankrupts, Appellee.

MOTION TO AFFIRM

And in the alternative, the said Appellees, Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, and William L. Hart, as trustee in bankruptcy of the Phoenix Plumbing and Heating Company, a copartnership composed of Leo

Francis, D. L. Francis and Lyon Francis, copartners, and D. L. Francis, Leo Francis and Lyon Francis, as individuals, bankrupts, also move this Court to affirm the said Judgment and Decree entered by the District Court of the United States for the District of Arizona, on the 10th day of June, 1930, from a part of which Judgment and Decree, the appeal in the above entitled cause purports to have been taken, with costs to said Appellees, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ALICE M. BIRDSALL,
Counsel for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors, Appellees.

THOMAS W. NEALON,
Counsel for William L. Hart as Trustee in Bankruptcy of the Estate of the Phoenix Plumbing and Heating Company, Bankrupt, a Copartnership, Consisting of Leo Francis, D. L. Francis and Lyon Francis, Copartners, and D. L. Francis, Leo Francis and Lyon Francis, as Individuals, Bankrupts, Appellee.

UNITED STATES OF AMERICA,
DISTRICT AND STATE OF ARIZONA,
COUNTY OF MARICOPA. } SS.

ALICE M. BIRDSALL and THOMAS W. NEALON, being each duly sworn, each for herself and himself, and not one for the other, doth depose and say: I have read the within Motion to Dismiss, and in the alternative, Motion to Affirm, in the above entitled matter and know the contents thereof; and that the statements contained therein are true, according to the best of my knowledge, information and belief.

Alice M. Birdsall,

Thomas W. Nealon,

Subscribed and sworn to before me this 16th day of May, 1931.

(Seal)

Sara L. O'Brien,
Notary Public In and For Maricopa County, Arizona.

My commission expires: January 6, 1934.

STATEMENT OF FACTS RELATING TO MOTION TO DISMISS AND MOTION TO AFFIRM.

On August 17, 1929, Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, filed an involuntary petition in bankruptcy against the Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, Lyon Francis and D. L. Francis, as individuals, setting up the necessary jurisdictional facts, and alleging several acts of bankruptcy. (Transcript, pages 2-10).

Thereafter the Phoenix Plumbing and Heating Company and Leo Francis for himself, filed an admission of willingness to be adjudged a bankrupt, together with Schedules showing an excess of liabilities over assets of $27,061.26, (Transcript, pages 134-135) and D. L. Francis and Lyon Francis filed answers admitting insolvency of the Phoenix Plumbing and Heating Company, but denying that said Phoenix Plumbing and Heating Company was a partnership and denying that they were partners therein.

The Standard Sanitary Manufacturing Company, a corporation, and Crane Company, a corporation, creditors of said alleged bankrupts, filed answers admitting that said Phoenix Plumbing and Heating Company was a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, but denying the allegations of insolvency and of the various acts of bankruptcy in said creditors' petition theretofore filed. (Transcript, pages 10-17 for answer of Standard Sanitary Manufacturing Company, and stipulations and admissions, Transcript pages 240-245.)

The issues made by said petition in bankruptcy and said respective answers were on November 4th, 1929, referred to R. W. Smith as Special Master to ascertain and report the facts with his conclusions thereon. (Transcript, pages 17 and 18.)

That thereafter commencing on November 20th, 1929, and continuing for a considerable period thereafter, hearings were had before said R. W. Smith, sitting as a Special Master, under said order of reference, and evidence, both oral and documentary, was presented by said petitioning creditors in support of said petition in bankruptcy, and documentary evidence was submitted by contestants.

On the *11th* day of December, 1929, Crane Company, after first receiving permission so to do, withdrew its answer theretofore filed opposing said adjudication of bankruptcy, (Transcript, page 580) and withdrew from further part in said proceedings.

The matter was at the conclusion of the hearings submitted, and thereafter on February 18th, 1930, said Special Master made and filed his report (Transcript, pages 18-27), said report covering some seventeen findings of fact and five conclusions of law, and recommending that said Phoenix Plumbing and Heating Company, a copartnership composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, Lyon Francis and D. L. Francis, as individuals, and each of them be adjudged bankrupt as of the date of the filing of said involuntary petition, to-wit, August 17th, 1929.

That thereafter exceptions to said report of said Special Master were filed by said Standard Sanitary Manufacturing Company, the appellant herein, and by

D. L. Francis, and Lyon Francis, alleged bankrupts, which exceptions were argued by counsel and submitted to F. C. Jacobs, Judge of the District Court for the District of Arizona, on the 21st day of May, 1930, (Transcript, page 34), and on the 10th day of June, 1930, a decree was entered by said F. C. Jacobs, District Judge as aforesaid, overruling the objections to the report of said Special Master and approving and confirming said report of said Special Master, and declaring and adjudging the said Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, D. L. Francis and Lyon Francis, copartners, and Leo Francis, Lyon Francis and D. L. Francis, as individuals, to be bankrupts. (Transcript, pages 34 and 35.)

That thereafter the appellant, the Standard Sanitary Manufacturing Company, petitioned for appeal, which appeal was allowed by F. C. Jacobs, Judge of the District Court of the United States for the District of Arizona, on the 25th day of June, 1930, (Transcript, pages 627-628); that said Standard Sanitary Manufacturing Company, appellant, on said date, to-wit, June 25, 1930, filed in said court, its Assignments of Error, the same being directed to the Master's findings of fact Numbers 5 and 16, and conclusion of law Number 4, (Transcript, pages 629, 635 and 636) and praying that the Judgment of the District Court of the United States for the District of Arizona, overruling the objections of the Standard Sanitary Manufacturing Company, a corporation, to the Master's report, "*in so much thereof* as declares the payment of the $13,000.00 received from Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company, a corporation, by the said Phoenix Plumbing and Heating Company, a *corporation,* be reversed" etc. (Transcript, page 638.)

That on June 25th, 1930, Citation on Appeal was duly issued out of the District Court of the United States for the District of Arizona, directed to the appellees herein, citing said appellees to show cause in this court why the Judgment of said court "overruling the Standard Sanitary Manufacturing Company's objections to the Special Master's report and the Order of Adjudication in bankruptcy of the Phoenix Plumbing and Heating Company, *in so far as the same is affected by the said objections,* should not be corrected." (Italics ours) (Transcript, pages 653-654.) No supersedeas bond was filed staying said Judgment and Adjudication, but only a cost bond. (Transcript pages 638-640.)

On June 24, 1930, the first meeting of creditors of said bankrupt estate was held, at which meeting the appellant herein, Standard Sanitary Manufacturing Company, a corporation, appeared, and by its attorneys in fact thereunto duly authorized, filed its claim in the amount of $12,658.59, and participated in the proceedings by voting its claim for William L. Hart, as trustee in bankruptcy; said William L. Hart being thereupon elected by the majority in number and amount of the claims present and voting, and thereafter qualifying as such trustee, and being at the present time, the acting trustee of said bankrupt estate; that thereafter and on November 8, 1930, at a meeting of creditors called for the purpose of authorizing the trustee, to oppose the discharge of D. L. Francis, said appellant, Standard Sanitary Manufacturing Company, by and through its duly authorized attorney in fact voted its claim in favor of authorizing said trustee in bankruptcy to oppose said discharge of D. L. Francis, and on April 2, 1931, it further participated in proceedings in said Bankruptcy Court by joining with

the McGinty Construction Company in a petition asking the court for an order authorizing the trustee to disclaim on the defaulted contract of the Phoenix Plumbing and Heating Company; all of which appears by certified copies of proceedings in said bankruptcy court hereto attached marked Exhibit "A" and by reference made a part hereof.

The record on appeal was filed in this court on March 23, 1931.

BRIEF OF THE ARGUMENT

I.

No Appellate Jurisdiction or Appealable Decision.

Appellate jurisdiction does not exist as to the matter herein sought to be reviewed.

This is not an appeal from any of the three classes of "proceedings" enumerated in Section 25 of the Bankruptcy Act, as to which right of appeal is given. Neither can it be said to be an appeal prosecuted from orders in the "bankruptcy proceedings" other than the three enumerated in said Section 25, nor "in controversies arising in bankruptcy proceedings," both of which are allowable only by the Circuit Court of Appeals,—the appeal herein having been allowed by the court below and no application for appeal having been made to this court.

> "An important distinction is that appeals from orders in 'proceedings in bankruptcy' are allowable by the court below as in equity, if they are of three kinds of orders or judgments described in Bankruptcy Act § 25 (a); whereas appeals from orders in 'bankruptcy proceedings' of any other kinds than

those three, and in 'controversies arising in bankruptcy proceedings' are allowable only by the Circuit Court of Appeals and will reach only errors of law." Vol. 5. Fed. Proc. Sec. 2564, pp. 860-861.

Appeal petitions contained in the records and presented to and allowed by the District Court are not to be taken as applications to the Circuit Court of Appeals for leave to appeal under Section 24b of the Bankruptcy Act.

Ahlstrom v. Ferguson, 29 Fed. (2) 515, 13 A. B. R. (N. S.) 216.

Appeal from an order denying petition to amend specifications of objection to discharge held not appealable without allowance by the Circuit Court of Appeals and appeal dismissed.

American State Bank v. Ullrich, 28 Fed. (2) 753.

An order vacating an adjudication is not a judgment from which an appeal will lie under Section 25, nor is an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication.

Gilbert's "Collier on Bankruptcy" (1927) p. 558.

An order refusing to vacate and set aside an adjudication in bankruptcy is not appealable under Section 25a of the Bankruptcy Act.

B. R. Elec. & Tel. Mfg. Co. v. Aetna Life Ins. Co., 30 A. B. R. 424, 206 Fed. 885.

In re Ives, 7 A. B. R. 692, 113 Fed. 911.

Matter of DeCamp Glass Casket Co. et al., 47 A. B. R. 1, 272 Fed. 558.

An appeal from an order sustaining a demurrer to specifications of objection to application for discharge of

bankrupt was not an order "granting or denying a discharge," and it was therefore reviewable by an appeal under Section 24b and not under Section 25 of the Bankruptcy Act.

Broders v. Lage, 25 Fed. (2) 288.

Obviously, this is not an appeal from a "judgment adjudging or refusing to adjudge the defendant a bankrupt", which is allowed as of right under Section 25 of the Bankruptcy Act, because no error is assigned on the matter of adjudication, and the stipulation of counsel for the appellant herein admits that said adjudication upon other acts of bankruptcy than the one concerning which appeal is sought, was based on "competent evidence free from legal objection." (See stipulation as to scope of appeal.)

The brief of appellant also expressly states that no appeal is sought from the adjudication. (See appellant's brief, pages 7 and 8.)

The record shows conclusively that the adjudication in bankruptcy was based on three different acts of bankruptcy found by the Master to have been committed by the bankrupts. (Transcript, pages 24 and 25.)

As to two of these acts of bankruptcy, relating to preferential transfers to Crane Company, (Transcript, pages 24 and 25) no errors are assigned.

Any one act of bankruptcy set up in creditors' petition was sufficient to sustain an adjudication of bankruptcy.

"An adjudication of bankruptcy warranted by proof of an act of bankruptcy sufficiently alleged may not be

set aside because other alleged acts of bankruptcy were not properly pleaded and proved."

In re Lynan, et al., 127 Fed. 123, 62 C. C. A. 123; 11 A. B. R. 466.

II.

Appeal Sought is Wholly Upon Matters Which Are Moot.

The appeal attempted to be prosecuted in this case is not from a judgment of adjudication, but only from that part of the judgment rendered by the District Court of the United States for the District of Arizona, (which judgment confirmed the report of the Special Master finding three different specific acts of bankruptcy to have been committed, and finding the Phoenix Plumbing and Heating Company to be a partnership, as well as adjudicating said partnership and the individual members thereof bankrupts) which related to two findings of fact and one conclusion of law, all bearing on only one of the acts of bankruptcy found by the Master to have been committed by the bankrupts, concerning an alleged preferential payment to the appellant herein.

The language of appellant's brief on page 45 thereof, stating the relief sought by appellant in this court, limits and defines said question as follows: "That this appellant is entitled to a decision declaring said transaction to be not an act of bankruptcy, not an act made with intent to prefer one creditor over another"; and that the decision so asked by appellant, of necessity could be only moot.

It is the duty of a federal appellate court to decide actual controversies and not to declare principles of law which cannot affect the matter in issue in the case before it.

6 *Fed. Proc.* § 2966, p. 563.

In this case the court is asked to declare a principle of law, as well as examine and pass on the sufficiency of evidence, when there is no actual controversy before it, and one may never arise; the correctness of the finding of the Master upon the *one* Act of Bankruptcy based on an alleged preferential transfer to the appellant herein not affecting the adjudication of bankruptcy upon other acts found to have been committed, and a determination by this court of the matter here sought to be reviewed, being futile, since a decision could in no way bind the trustee or creditor in any actions which may be brought in the future to set aside the transfer, either as preferential or fraudulent.

A finding on a creditors' petition that a charge of preferential transfer of property by the alleged bankrupts was not sustained is not an adjudication which could bind a trustee subsequently appointed on an adjudication made by another court in a suit brought by him against the alleged preferred creditor to recover the property.

In re Sears-Humbert & Co. 128 Fed. 275, 62 C. C. A. 623.

The alleged bankrupt may not appeal from a judgment dismissing an involuntary petition on the ground that the trial court based its decree on other reasons than those urged by him, or not on all reasons urged.

Houchin Sales Co. v. Angert, 11 Fed. (2) 115.

Suggested questions which have not yet arisen not discussed.

Murphy v. Kerr, 5 Fed. (2) 908.

An appeal from a decree dismissing an involuntary petition is moot where it is disclosed that upon the rendition of the decree, the alleged bankrupt was adjudicated a bankrupt upon another petition.

Hirsh & Bro. v. Cohen & Brown, 22 Fed. (2) 806, 11 A. B. R. (N. S.) 222.

Appellate courts will not anticipate possible grievances or try cases piece-meal.

Pearson v. Higgins, 34 Fed. (2) 27. Cert. denied, 280 U. S. 593, 50 Sup. Ct. 39, 74 L. Ed. 641.

Where there is now no actual controversy between the parties and no subject matter upon which the judgment of the court can operate, the appeal will be dismissed.

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293, 16 Sup. Ct. Rep. 132.

Kimball v. Kimball, 174 U. S. 158, 43 L. Ed. 932.

Lewis Pub. Co. v. Wyman, 228 U. S. 610, 57 L. Ed. 989, 33 Sup. Ct. Rep. 559.

III.

Appellant Estopped to Prosecute Appeal from Part of Judgment While Accepting Benefits of Other Part of Judgment.

The appellant herein is seeking review of part of a judgment of the District Court of the United States for the District of Arizona, namely, findings of the Master confirmed by the District Court concerning an Act of Bankruptcy consisting of a preferential transfer by bankrupt to appellant, while accepting the benefits of the adjudication in bankruptcy by filing its claim in the

bankruptcy court and participating in the proceedings and the conduct of the administration of the bankrupt estate.

The rule is well settled that parties to a decree cannot accept its benefits and at the same time have a review in respect to its burdens.

Albright v. Oyster, 60 Fed. 644, 9 C. C. A. 173.

Spencer v. Babylon R. Co., 250 Fed. 24, 34 C. C. A. 668.

One cannot accept a benefit under a judgment and then appeal from it when the effect of the appeal may be to amend the judgment unless his right to benefit is absolute and cannot be affected by a reversal.

In re Minot Auto Co., 298 Fed. 853.

A creditor by filing its claim in bankruptcy acquiesces in the adjudication and having participated in subsequent proceedings cannot thereafter object to adjudication.

In re Hintze (D. C.) 134 Fed. 141.

In re Worsham, 142 Fed. 121, 73 C. C. A. 665.

In re New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202.

Sabin v. Larkin-Green-Logging Co., 218 Fed. 984, 986.

ARGUMENT

Paragraph I.

No Appellate Jurisdiction.

It is the belief of appellees that the Motion to Dismiss should be granted for the reason that this court is

without jurisdiction to hear the appeal attempted to be prosecuted, because no appeal lies to this court as a matter of right under the provisions of Section 25 of the Bankruptcy Act, providing three judgments only appealable as of right, and in which the appeal is allowed by the lower court.

The appeal is not sought in this case from "a judgment adjudging or refusing to adjudge the defendant a bankrupt" as appears from the Citation on Appeal, the Assignments of Error, the Stipulation as to the Scope of Appeal, and the Brief of the appellant hereinbefore pointed out, all expressly stating that *no appeal is taken from the order of adjudication.*

The only possible way in which a review of the questions here sought to be brought before this court could be obtained, would have been through a petition to this court for allowance of an appeal under the provisions of Section 24b of the Bankruptcy Act, it being within the discretion of this court to allow such appeals.

The case of Broders v. Lage, 25 Fed. (2) 288, decided by the Circuit Court of Appeals for the Eighth Circuit, in March, 1928, reviews at length, the appellate jurisdiction granted under the Bankruptcy Act and the evident intention of Congress in limiting appeals in Bankruptcy. In that case it was held that an order sustaining a demurrer to Specifications of Objection filed by the trustee and a creditor, to the application of the bankrupt for order of discharge, was not an order "granting or denying a discharge," and it was, therefore, reviewable by an appeal under Section 24b, and not under Section 25 of the Bankruptcy Act.

The court said: "The clause 'to be allowed in the discretion of the appellate court' applies to appeals under Section 24b and not to appeals under Section 25." Then, after calling attention to the fact that the order sustaining the demurrer was entered April 12, 1927, and the petition for appeal filed May 10, 1927, which appeal was allowed by the trial judge on May 12, 1927, and the transcript not filed in the office of the clerk of the appellate court until July 8, 1927, the court continues, "and no application for the allowance of an appeal from the order complained of has ever been made to this court and no such appeal has been allowed by this court.

> "It will be observed that Section 24b provides for review by appeal of all orders both interlocutory and final, entered in proceedings in bankruptcy. The absolute right to prosecute such an appeal would open the door to innumerable appeals from summary orders entered in bankruptcy proceedings, which might greatly impede the due and proper administration of the estates of bankrupts. We think Congress sensed this danger and for that reason, wrote into the Act the language 'by appeal * * * to be allowed in the discretion of the appellate court' and thereby intended to provide that a party desiring to prosecute an appeal from such an order, must make proper application to the appellate court for an order allowing such appeal, and that the appellate court, upon the consideration of such application, in the exercise of its discretion, may either grant or deny the application.
>
> "The authors of Collier on Bankruptcy in the note to Section 24 as amended at page 159 of the 1927 supplement, say: 'The scope of this amendment as explained by Senator Walsh, who suggested it, is stat-

ed by him as follows: "It would be intolerable, however, to allow an appeal from every order which might be made in bankruptcy proceedings and, consequently, the bill was modified so as to provide that except in the cases mentioned in Section 25, the appellate court should exercise a discretion as to whether an appeal should be allowed or not. Accordingly, the plain meaning of the law as amended is that in the cases mentioned in Section 25, the right to appeal is absolute, and no leave need be taken. In all other cases as prescribed in subdivision "b" of Section 9, (24b of the Bankruptcy Act) the party desiring to have an order reviewed must go to the appellate court and ask leave to prosecute an appeal." ' ". * * * * * "no application for the allowance of an appeal having been made to this court within the statutory period, this court is without jurisdiction to enter into a consideration of the merits and must dismiss the appeal."

It must be remembered that appeals in bankruptcy are purely statutory and the jurisdiction of the appellate court with relation thereto is limited by the language of the Act itself. The definiteness of the language of Section 25 specifying the judgments from which appeals can be taken as a matter of right, and the consistency with which appellate courts have held their jurisdiction to be limited in appeals allowed by the court below and prosecuted as a matter of right to only such judgments as are distinctly classified therein, precludes the conclusion that it was intended appeal might be taken under Section 25 from subsidiary parts of a judgment, not relating to the main issue, the appeal not seeking a reversal of that main issue. In other words, it is evident that the three clear-cut issues entitled to be reviewed without permission of

the appellate court are set forth so distinctly for the very purpose of avoiding confusion, and also, as suggested in the language quoted in Broders v. Lage, for the purpose of preventing the appellate court from being flooded with a mass of unnecessary work in examining lengthy records on matters of fact as well as of law, in questions involving the administration of estates, many of which appeals would doubtless be taken for the very purpose of delaying and hindering due administration.

The first of the matters classified from which appeal can be taken as a matter of right, is a judgment in rem—the judgment either denying or granting an adjudication, and the issue involved is primarily the status of the alleged bankrupt. The second is likewise a judgment fixing the status of the bankrupt, namely, a judgment granting or denying him a discharge, and the third is a judgment, fixing the status of a creditor in the bankrupt estate, namely, allowing or rejecting a claim for over $500.00. While it is, of course, conceded, that on an appeal from any one of these judgments, properly taken, all questions of law and fact pertaining thereto may be reviewed, yet it does not follow that an appeal may be prosecuted under this provision from some incidental question not necessary to support the main issue without appealing from the judgment on such main issue, concerning which the right of appeal is given, and where indeed it is expressly provided that the appeal taken shall *not* disturb the status fixed by the decision on that main issue.

The case at bar involved a contest on an adjudication in bankruptcy, on an involuntary petition in bankruptcy alleging several Acts of Bankruptcy, and after extended hearings, the Master made a report finding

three separate acts of bankruptcy to have been committed by the bankrupts and recommending adjudication (this in addition to finding a partnership to have existed as alleged). The District Judge entered an order confirming the Master's report in toto, and adjudged the defendants bankrupts. From this adjudication no appeal is sought, but the appellant by express language in its petition for appeal, by putting up no supersedeas bond staying the administration of the estate in bankruptcy, by the stipulation filed herein as to the scope of the appeal, and by the language of its brief filed herein has unqualifiedly stated that no appeal is taken or *desired* from the Order of Adjudication.

Appellees submit that under the authorities hereinbefore cited on this point and under the plain provisions of the Bankruptcy Act, the appeal in this case is not prosecuted from any of the judgments defined in Section 25 of the Bankruptcy Act, appealable as a matter of right, and no appeal having been allowed by this court under the provisions of Section 24b of the Act, this court is without jurisdiction and the appeal should be dismissed.

PARAGRAPH II.

Appeal Sought on Matters Which are Moot.

It is admitted by appellant as appears from the language of its brief (pages 7, 8 and 45) and by the stipulation filed on the "Scope of the Appeal," that it is not now questioning, and never has questioned, the adjudication of bankruptcy as of August 17, 1929, the date of the filing of creditors' petition.

It does not question other findings of fact and conclusions of law on other acts of bankruptcy and the relief

asked for in this court is for a decision "declaring said transaction to be not an Act of Bankruptcy, not an Act made with intent to prefer one creditor over another"; (referring to a transaction which it designates as the "Lincoln Mortgage Company transaction" and which it claims was not a preferential payment to appellant constituting an Act of Bankruptcy).

It appears so elementary that a decision of this court granting all the relief asked by appellant, could be only moot, that discussion seems unnecessary.

As was said in the case of in Re Sears-Humbert & Co., 128 Fed. 275, 62 C. C. A. 623, (that being a case where a petitioning creditor appealed from a judgment dismissing its petition and refusing to adjudge Sears-Humbert & Co. bankrupts on the ground that a transfer alleged to have been preferential had not been sustained as an act of bankruptcy, the same company having been meanwhile adjudicated bankrupt in another District:)

> "The question presented by this appeal has, therefore become academic. The copartnership being now in bankruptcy, it is a matter of no moment whatever whether the specific act of bankruptcy alleged in the petition in the Western district, was or was not established. A reversal of the judgment appealed from would lead to no practical result. * * * It is suggested that the judgment appealed from will be a bar to an action by the trustee to set aside the alleged preference to the Whitehall Portland Cement Company, which was pleaded as an Act of Bankruptcy. This proposition is also untenable. The trustee, if he proceeds in the matter, must begin a plenary suit in which he is the plaintiff and the Cement Company is defendant. How a judgment in a proceeding insti-

> tuted by certain creditors to have Sears-Humbert & Co. declared bankrupts can be regarded as res adjudicata of such a suit, we are unable to comprehend. The parties are different, the proof is different and the subject matter is different."

That decision is squarely in point in the instant case, where exactly the same situation prevails, the only difference being that in the case cited, review was sought by petitioning creditors and the adjudication had been made in another district; but the main issue remains the same, namely, that no decision by an appellate court as to whether a certain transfer was a preferential payment which constituted an act of bankruptcy, where adjudication had been made on other grounds, could bind a trustee in future proceedings for recovery of the preference.

The matters sought to be reviewed here are, therefore, necessarily moot. There is no right of the appellant which is being prejudiced, no present controversy existing, the subject matter of which can be passed upon by this court. As has been heretofore pointed out and as is well said in the Sears case, the proof required to sustain a transfer as preferential so that it will constitute an act of bankruptcy, and that required to make recovery by the trustee in a plenary suit brought for that purpose, is entirely different.

The Supreme Court of the United States has, in many cases, laid down the rule concerning the duty of appellate courts when moot questions are presented for review, in such clear and unmistakable terms that no doubt can exist on the subject.

As was said in California v. San Pablo & Tulare R. R. Co., 149 U. S. 308, 37 L. Ed. 747:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the results as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard."

And that language has been approved by the same court in the case of Mills v. Green, 159 U. S. 651, 40 L. Ed. 293, and in Kimball v. Kimball, 174 U. S. 158, 43 L. Ed. 932.

See also Lewis Publishing Company v. Wyman, 228 U. S. 610, 57 L. Ed. 989.

Appellees, therefore, submit that the matters on which review is sought by this court in appellant's attempted appeal are so clearly moot that the appeal must be dismissed.

PARAGRAPH III.

Estoppel of Appellant.

The appellant herein is admittedly seeking a review by this court of a part of a judgment and by way of relief is asking a "declaration" that certain findings concerning transactions in which appellant was involved are

incorrect, while accepting the benefits of a judgment of adjudication by filing its claim in the Bankruptcy Court and actively participating in proceedings in that court in the administration of the bankrupt estate.

It is more than willing as appears by the record, to accept any benefits which may accrue from such administration of the estate, but unwilling to submit to any burdens which may be imposed by the judgment of adjudication. In other words, it is asking a court of equity to grant relief (in advance) from such burdens as the Bankruptcy Court may impose upon creditors, while it takes advantage of the machinery of that court to further its own interests.

That by the filing of a claim in the Bankruptcy Court a creditor acquiesces in the adjudication seems to be well settled by an unbroken line of decisions.

As was said in the case of Sabin v. Larkin-Green Logging Co., 218 Fed. 984:

> "There exists another reason, however, why the defendant should not be permitted to resist the suit, which is that it has subsequently proved its claim as unsecured, and participated in the subsequent proceeding. Having done this and it is so alleged, it cannot object to the jurisdiction of the court to make the adjudication,"

citing in support thereof:

In re Hintze, 134 Fed. 141.

In re Worsham, 142 Fed. 121, 73 C. C. A. 665.

In re New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202.

all to the same effect.

That parties to a decree cannot accept its benefits and at the same time have a review in respect to its burdens seems equally well settled.

Spencer v. Babylon R. Co., 250 Fed. 24.
Albright v. Oyster, 60 Fed. 644, 9 C. C. A. 173.
In re Minot Auto Co., 298 Fed. 863.

That the appellant herein has filed its claim in the Bankruptcy Court and actively participated in the proceedings in that court in the administration of the estate is proven by the records of said court, herewith submitted.

That on a Motion to Dismiss, such matters may be proved by extrinsic evidence has been held by the Supreme Court of the United States in the following cases:

Mills v. Green, 115 U. S. 651, 40 L. Ed. 293.
Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981.

In the latter case it was said:

> "From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear on the record before it, to be proved by extrinsic evidence."

Appellees respectfully submit that appellant's position in attempting to appeal from a certain part of a judgment, while it accepts the benefits of the other part of the judgment of adjudication by filing its claim in the Bankruptcy Court and participating in the proceedings therein, cannot be sustained, and that its appeal must be dismissed, by reason of its estoppel to prosecute the same.

Since the above authorities and discussion cover all matters contained in the alternative "Motion to Affirm," in the interest of brevity, no separate argument is submitted in connection therewith.

Respectfully submitted,

ALICE M. BIRDSALL,
Counsel for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors, Appellees.

THOMAS W. NEALON,
Counsel for William L. Hart, as Trustee in Bankruptcy of the Estate of the Phoenix Plumbing and Heating Company, Bankrupt, a Copartnership, consisting of Leo Francis, D. L. Francis and Lyon Francis, copartners, and D. L. Francis, Leo Francis and Lyon Francis, as Individuals, Bankrupts, Appellee.

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

In the Matter of Phoenix Plumbing & Heating Co.
a copartnership
Bankrupt

No. B 522 Involuntary

REFEREE'S RECORD OF PROCEEDINGS

Involuntary petition filed Sept. 18, 1929; Adjudicated June 10, 1930.

1930

June 11, 1. Order of Adjudication and reference.

2. Schedules of Partnership—2 copies received from Clerk.

June 12, 3. Order fixing date for first meeting of creditors.

June 13, 4. Notice to Leo Francis to appear (copy to O. E. Schupp, Atty.)

June 13, 5. Notice to Lyon Francis to appear (copy mailed O. E. Phlegar, Atty.)

June 13, 6. Notice to D. L. Francis to appear.

June 23, 7. Proof of Publication of Notice of first meeting.

June 24, 8. Affidavit of Mailing notices.

June 24, First meeting of creditors held (see minutes filed.)

June 24, 9. Filed Minutes of first meeting.

June 24, 10. Order continuing first meeting to 6-25-30.

June 24, 11. Election of Trustee by Creditors.

June 24, 12. Notice to Trustee of appointment.

June 24, 13. Trustee's acceptance.

June 24, Bond of William L. Hart, Trustee. Transmitted to Clerk for filing (Bond written by F & D Co. of Maryland, Amt. $1000.00)

June 24, 1930 14. Order approving bond of Trustee.

June 25, 15. Filed Notice of taxing costs in involuntary proceedings.

June 25, 16. Filed Oath of Trustee.

June 25, 17. Filed Petition by Trustee to employ counsel.

June 25, 18. Affidavit of Attorney proposed.

June 25, 19. Order authorizing trustee to employ counsel.

June 25, Held—Continued 1st meeting of creditors (see minutes).

June 25, 20. Filed Minutes of Continued first meeting.

June 25, 21. Filed Petition for sale of personal property.

June 25, 22. Filed Order for Sale of Personal property.

June 25, 23. Filed Order adjourning meeting to July 24, 1930.

July 9, 24. Filed Schedules of D. L. Francis—2 copies.

July 1, 24½. Report and account of Receiver.

July 24, Held—Continued meeting held Present: The trustee and his counsel, T. W. Nealon Upon motion of Trustee the meeting to adjourn to August 2nd, 1930. Receiver's report approved and Receiver Discharged.

July 24, 24¾. Order approving acct. and Report of Receiver and for Receiver's Discharge.

July 29, 25. Filed—Schedules for Lyon Francis—2 copies.

Aug. 2, Held—Continued meeting of creditors. Present, the Trustee and his attorney, T. W. Nealon, esq.,
Verbal report of matters connected with the estate made by attorney for trustee with request for continuance to August 20, 1930. Ordered that the meeting stand adjourned until August 20th, 1930.

Aug. 20, Continued meeting held. Trustee verbally reported his inability to make sale of the property of the estate and asked for instructions as to procedure with reference to storage of property and fire insurance which expires today.
Upon motion of counsel for trustee ordered that this meeting be and hereby is adjourned to Sept. 2nd, 1930.

Sept. 2, 26. Return of Sale of personal property. Continued meeting held. Present: The Trustee and his Attorney, Thos. W. Nealon.
Trustee's return of sale of personal property considered and no adverse interests appearing the said sale is approved and con-

firmed, and the Trustee authorized to make proper conveyance by bill of sale upon receipt of the full purchase price as in said returns set forth.
Upon motion of Trustee the first meeting of creditors herein is finally adjourned.

Sept. 2, 27. Order approving and confirming sale.

Sept. 2, 28. First account & report of Trustee and petition for payment of expenses and for dividend.

Sept. 22, 29. Ordered that meeting of creditors be held on October 4th, 1930 at 10 A. M.

Sept. 22, Notice of meeting mailed to all creditors of partnership and individual estates.

Oct. 4, Meeting of creditors held. Appearances: The Trustee in person and by counsel, Thomas W. Nealon, Esq. The bankrupt Leo Francis by counsel, O. E. Schupp; the petitioning and other creditors by Alice M. Birdsall, Atty. Standard Sanitary Mfg. Co. by F. J. Duffy, Esq., Atty. and J. H. Williams, Creditor; Trustee's first account and report examined and being found correct the same is approved. Certain expenses incurred by the Trustee and those of petitioning creditors as fixed by the Judge of the U. S. District Court are fixed, allowed and ordered paid in full. Allowance on account made to Referee for expenses in the sum of $125.00.

Allowance to attorney for petitioning creditors on account is made in the sum

of $150.00 and to attorney for bankrupt, Leo Francis in the sum of $50.00 on account, and to trustee on account of commissions $40.00. Allowance on account of compensation to Receiver is made in the sum of $75.00. Each of the said allowances are ordered paid from the funds of the estate in the hands of the Trustee.

Trustee's prayer for authority to institute certain suits for the recovery of preferences involved in the estate is granted.

Oct. 4, 30. Petition by attorney for petitioning creditors for allowance on account of fee.

Oct. 4, 31. Petition of petitioning creditors for return of expenses.

Oct. 6, 32. Order approving and confirming trustee's first account and report—for payment of expenses of administration accrued—making allowance and authorizing trustee to sue in the state court for the recovery of certain alleged preferences.

Oct. 28, 33. Application of creditor for call of meeting of creditors for the purpose of authorizing trustee to oppose discharge of Bankrupt, D. L. Francis.

Oct. 28, Ordered that meeting of creditors be held on Nov. 8, 1930, at 10 o'clock A. M.

Oct. 28, 34. Notice of meeting of creditors Nov. 8th mailed to all creditors.

Nov. 8, Meeting of creditors held pursuant to notice mailed to creditors dated Oct. 28, 1930.

Present: The Trustee by counsel. Thos. W. Nealon and creditors present and represented as shown by authorization of trustee by creditors filed herein, totaling 18.

The Trustee is authorized to oppose the discharge of the bankrupt D. L. Francis by a unanimous vote of all claims filed and represented at the meeting being 18 in number and aggregating in amount the sum of $31068.73, said authorization being in writing and signed and filed herein.

Nov. 8, 35. Authorization of Trustee by creditors to oppose bankrupt's discharge.

Nov. 8, (Referee's certificate of meeting of creditors authorizing Trustee to oppose discharge filed with clerk U. S. Dist. Court.)

Feb. 18, 36. Stipulation as to scope of appeal.

Apr. 2, 37. Petition for disclaimer.

May 5, 38. Answer of Trustee to petition for disclaimer filed by McGinty Construction Company and Standard Manufacturing Co.

Form 831C—Proof of Unsecured Debt with Letter of Attorney. Order by Above description.

Dennis & Co., Inc., Publishers, Buffalo, N. Y. See Instructions on other side.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE PHOENIX DISTRICT OF ARIZONA DIVISION

IN THE MATTER OF
LEO FRANCIS, D. FRANCIS AND LYON FRANCIS A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME OF PHOENIX PLUMBING & HEATING COMPANY *Bankrupts.*

IN BANKRUPTCY No. .....

STATE OF ARIZONA
COUNTY OF MARICOPA } SS.

At Phoenix in the Phoenix District of Arizona on the 21st day of June 1930 came R. C. Bower of Phoenix in the county of Maricopa in the said district of Arizona and made oath

(1) That he is the authorized agent of STANDARD SANITARY MANUFACTURING CO. of Pittsburgh in the county of Pittsburgh and state of Pennsylvania duly authorized to transact business in the state

of Arizona and with its usual place of business in Phoenix, Arizona.

(4) That the said Bankrupts the persons for whom a petition for adjudication of bankruptcy has been filed, was, at or before the filing of said petition, and still is, justly and truly indebted to said Standard Sanitary Manufacturing Company in the sum of ..... dollars ($12,658.59).

(5) That the consideration of said debt is as follows: Plumbing supplies and materials furnished to the said Phoenix Plumbing & Heating Co. a copartnership on open account, at the special instance and request and under purchase orders of the said alleged bankrupts. An itemized statement, together with the receipts thereon being attached hereto and made a part hereof.

(5a) That the date of maturity of said debt is up to and including the 30th day of August, 1929.

(5b) That no note has been received nor judgment recovered therefor (*except* No exceptions.

(6) That no part of said debt has been paid (*except* the sum of $10,000.00.

(7) That there are no set-offs or counter claims to the same (*except* There are no offsets or counter claims to the same.

(8) That said creditor has not, nor has any person by order of said creditor, or to the knowledge or belief of said deponent for the use of said creditor, received any manner of security for said debt whatever (*except the following which are the only securities held by said creditor for said debt* None

(9) That this deposition is not made by the claimant (nor if it has been hereinbefore stated to be a corporation by its treasurer) in person because Standard Sanitary Mfg Co is a corporation and that deponent is duly authorized by his principal to make this deposition and that it is within his knowledge that the debt hereinbefore mentioned was incurred as and for the consideration, and said creditor is constituted as herein above stated.

Filed June 24, 1930.

R. W. Smith,
Referee.

(18)

H. M. Clark Office Supply Company

(10) LETTER OF ATTORNEY to Armstrong, Lewis & Kramer Attorney-at-Law. You or any one of you are hereby authorized by said creditor by the person making the foregoing deposition, who is duly authorized thereto, to appear for and represent said creditor and vote for said creditor in any proceedings, or meetings, which may be had or called in the above entitled proceeding, in court, before the referee in bankruptcy or elsewhere, and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such selection is held, to accept or in your discretion oppose confirmation of, any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be, or may become, payable to said creditor therein for or on account of said debt.

In witness whereof said creditor has hereunto signed its name and affixed ..... seal, when signing the deposition preceding, the 23rd day of June 1930.

Subscribed, sworn to and acknowledged before me this 23rd day of June 1930 by the subscriber who (is per-

sonally known to me) or (has satisfactorily proved his identity).

R. C. Bower (L. S.)

(Seal)

Standard Sanitary Mfg. Co. (L. S.)
Creditor

By R. C. Bower

(Seal)

Gladys Parry
Notary Public

My Com. expires Oct. 29, 1933.

STATEMENT AND ITEMIZED ACCOUNT OF INDEBTEDNESS OWED TO THE STANDARD SANITARY MANUFACTURING COMPANY FROM THE PHOENIX PLUMBING AND HEATING COMPANY, a copartnership.

Total amount of the general account due for plumbing supplies and material furnished the Phoenix Plumbing and Heating Company by the Standard Sanitary Manufacturing Company up to and including the month of August 1930	$22,658.59
Received of the Southern Surety Company, Surety on the bond of the Phoenix Plumbing & Heating Company, contractors, on account of materials furnished in City Hall job upon the completion thereof	10,000.00
Balance due upon the itemized statement attached hereto and made a part hereof	$12,658.59

(Invoices covering above amounts attached to original claim in file not copied here.)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE DISTRICT OF ARIZONA

In the Matter of the

PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, D. L. Francis and Lyon Francis, as Individuals,

Bankrupts.

No. B-522 Phoenix

ELECTION OF TRUSTEE BY CREDITORS.

At Phoenix, in said district on the 24th day of June, 1930, before R. W. Smith, Referee in Bankruptcy:

This being the day appointed by the Court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the *Messenger* by publication and by mail to all creditors as required by

law, we whose names are hereunder written being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint WILLIAM L. HART, of Phoenix, in the county of Maricopa, and state of Arizona, to be the trustee of the said bankrupt's estate and effects.

Signature of creditors	Residence	Amount of claims
Momsen Dunnegan & Ryan,	El Paso, Texas	486.08
Union Oil Co of Cal	Phx	384.55
Pratt Gilbert Co	Phx	73.31
Gila Valley Pl & H. Co.	Safford	11.99
Welker & Son Transfer Co	Safford	165.41
Standard Ins. Co.	Phx	226.32
Comm'l Nat'l Bank	Phx	6100.00
Southwest Sash & Door Co	Phx	23.45
Phx Ariz Club	Phx	45.00
Mathews Paint Co	Phx	73.10
M & M. Welding Co	Phx	38.60
Heinze Bowen & Harrington	Phx	29.25
I Diamond and N. Diamond	Phx	16.82

By Alice M. Birdsall,
Their Attorney

American Bonding Company of Baltimore a corporation $15,738.95

By J. L. B. Alexander,
Their Attorney

Signature of Creditors	Residence	Amt of Claim
Standard Sanitary Mfg Co	Phoenix	12,868.00
Union Oil Co.		284.00

By Armstrong, Lewis & Kramer,
Their Attorney

Filed June 24, 1930
R. W. Smith,
Referee

(11)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

In the Matter of

PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, copartners and Leo Francis, D. L. Francis and Lyon Francis, as Individuals,

Bankrupts.

IN BANKRUPTCY No. B-522- Phoenix.

MINUTES OF FIRST MEETING OF CREDITORS HELD June 24, 1930, at 9 A. M.

Present:

Bankrupts Lyon Francis and D. L. Francis by counsel O. E. Phlegar, Esq.
Leo Francis by counsel O. E. Schupp, Esq.,

Creditors as follows:

Standard Sanitary Mfg. Co. by Armstrong, Lewis and Kramer.
Rio Grande Oil Co. by Armstrong, Lewis and Kramer.
American Bonding Co. of Baltimore by J. L. B. Alexander, Esq.

Momsen-Dunnegan-Ryan Co.	Alice	M.	Birdsall
Union Oil Co.	"	"	"
Pratt-Gilbert Hardware Co.	"	"	"
Gila Valley Plbg. & Htg. Co.	"	"	"
Welker & Son Transfer Co.	"	"	"
Standard Insurance Agency	"	"	"
Com'l National Bank of Phoenix	"	"	"
So. Wes. Sash & Door Co.	"	"	"
Phoenix Arizona Club	"	"	"
Mathews Paint Co.	"	"	"
M. & M. Welding Co.	"	"	"
Heinze, Bowen & Harrington	"	"	"
I. Diamond and N. Diamond	"	"	"

All claims represented voted for William L. Hart of Phoenix, for Trustee, and the same elected. Bond fixed at $1,000.00.

Meeting continued to June 25, 1930, at two P. M.

W. M. SMITH,
Clerk.

Filed June 24, 1930.

R. W. SMITH,
Referee.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE DISTRICT OF ARIZONA

In the Matter of the

PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, D. L. Francis and Lyon Francis, as Individuals,

Bankrupts.

No. B-522 Phoenix

AUTHORIZATION OF TRUSTEE BY CREDITORS TO OPPOSE BANKRUPT'S DISCHARGE

At Phoenix, in said District, on the 8th day of November, 1930, before the Honorable R. W. Smith, Referee in Bankruptcy:

This being the day appointed by the court for a meeting of creditors in the above bankruptcy, for the purpose of considering the matter of authorizing the trustee to oppose the bankrupt's discharge, and of which due notice has been given, we, whose names are hereunder written, being the majority in number and amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby authorize the trustee, William L. Hart, to oppose the discharge of said bankrupt.

Signature of Creditors	Amount of Debt
Momsen-Dunnegan-Ryan Company	$486.08
Union Oil Company	384.55
Pratt-Gilbert Hardware Company	73.31
Gila Valley Plumbing and Heating Company	11.99

Filed Nov. 8, 1930
R. W. SMITH, *Referee*

(35)

Signature of Creditors	Amount of Debt
Welker and Son Transfer Company	$ 165.41
Standard Insurance Agency	226.32
Commercial National Bank	6100.00
Southwestern Sash and Door Company	23.45
Phoenix, Arizona Club	45.00
Mathews Paint Company	73.10
M & M Welding Company	38.60
Heinze-Bowen-Harrington Company	29.25
I. Diamond and N. Diamond	16.82

By ALICE M. BIRDSALL,
Their Attorney

American Bonding Co. of Baltimore $15262.24

By J. L. B. ALEXANDER,
Its Attorney

Rio Grande Oil Co. 295.71
Standard Sanitary Mfg. Co. 12658.59
ARMSTRONG, KRAMER, MORRISON & ROCHE,
By F. J. DUFFY
Southern Surety Co. 10,000.00
Southern Surety Co.
By CLARK & CLARK By FRANK J. DUFFY 440.55
Their Attorneys

$31,068.73

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA }
COUNTY OF MARICOPA } SS.

I, R. W. SMITH, Referee in Bankruptcy for the District of Arizona, with my principal office at Phoenix, Arizona, do hereby certify and attest that the matter of adjudication in Bankruptcy of Phoenix Heating & Plumbing Company, a copartnership composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and of Leo Francis, Lyon Francis and D. L. Francis, as individuals, being No. B-522-Phoenix, was referred to me by F. C. Jacobs, United States District Judge for the District of Arizona, on the *10th* day of June, 1930; and I hereby further certify and attest that the copies hereto attached consisting of ten sheets beside this are true copies of records filed in my office and entries made in my books as such Referee; and I further certify that all entries made in my docket were made by me personally or under my supervision; that I have carefully compared the foregoing copies with the originals in my office, and that the same are true copies as the same appear on file and of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand at Phoenix, Maricopa County, Arizona, this *9th* day of May, 1931.

R. W. Smith,
Referee in Bankruptcy.

Signature of Creditors	Amount of Debt
Momsen-Dunnegan-Ryan Company	$486.08
Union Oil Company	384.55
Pratt-Gilbert Hardware Company	73.31
Gila Valley Plumbing and Heating Company	11.99

Filed Nov. 8, 1930
R. W. Smith, *Referee*

(35)

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Their Attorney

American Bonding Co. of Baltimore $15262.24

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Its Attorney

Rio Grande Oil Co. 295.71
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By F. J. Duffy
Southern Surety Co. 10,000.00
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By Clark & Clark By Frank J. Duffy 440.55
Their Attorneys

$31,068.73

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA }
COUNTY OF MARICOPA } SS.

I, R. W. SMITH, Referee in Bankruptcy for the District of Arizona, with my principal office at Phoenix, Arizona, do hereby certify and attest that the matter of adjudication in Bankruptcy of Phoenix Heating & Plumbing Company, a copartnership composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and of Leo Francis, Lyon Francis and D. L. Francis, as individuals, being No. B-522-Phoenix, was referred to me by F. C. Jacobs, United States District Judge for the District of Arizona, on the *10th* day of June, 1930; and I hereby further certify and attest that the copies hereto attached consisting of ten sheets beside this are true copies of records filed in my office and entries made in my books as such Referee; and I further certify that all entries made in my docket were made by me personally or under my supervision; that I have carefully compared the foregoing copies with the originals in my office, and that the same are true copies as the same appear on file and of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand at Phoenix, Maricopa County, Arizona, this *9th* day of May, 1931.

R. W. Smith,
Referee in Bankruptcy.

UNITED STATES OF AMERICA,
STATE OF ARIZONA,
COUNTY OF MARICOPA. } SS.

I, J. LEE BAKER, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that R. W. SMITH, whose signature appears to the foregoing certificate was, at the time of signing the same, and is now, the duly appointed, qualified and acting Referee in Bankruptcy, in the District Court of the United States for the District of Arizona, for and including the County of Maricopa, Arizona; that I am well acquainted with his signature and know that the signature appearing on said certificate is the genuine signature of said R. W. Smith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Phoenix, Arizona, on this 15th day of May, 1931.

(Seal)

J. LEE BAKER,
Clerk of the District Court of the United States for the District of Arizona.

By .....
Deputy Clerk.